No. 59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA,
Appellant,
HENRY ROMPEL, JR., ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNEST HERBST, DECEASED,
Appellee.

On Appeal From the District Court of the United States For the Western District of Texas.

MOTION OF HOBART HUSON FOR LEAVE TO FILE AMICUS CURIAE ARGUMENT and ARGUMENT OF AMICUS CURIAE

HOBART HUSON,
Attorney and Counsellor.

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To the Honorable Supreme Court:

Comes Hobart Huson, a practicing attorney at the bar of the State of Texas and a duly admitted attorney and counsellor of the Supreme Court of the United States, and verily believing that the decision of the Court in the above captioned case is fundamentally erroneous and that if certain grounds which are raised by

the record but have not been particularly pointed out in briefs of counsel, were brought to the attention of the Court, that it would reconsider its decisions and holdings in the case at bar and affirm the judgment of the lower courts, respectfully asks leave of the Court to file, as **amicus curiae,** the attached and accompanying argument as such **amicus curiae.**

Respectfully submitted,

HOBART HUSON,
Attorney and Counsellor
Refugio, Texas.

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ARGUMENT OF AMICUS CURIAE

To the Honorable Supreme Court:

The law of Texas appears to be that a man may live in open or in quasi adultery with a woman, and still the woman will be treated as a partner insofar as property accumulated by joint efforts is concerned. Where contribution

is established, in the absence of showing the extent thereof, it is presumed that the woman is entitled to one-half. If there be an agreement as to the share she is to receive, she is entitled to the agreed share. If deeds be taken in the joint names she is entitled to an equal one-half without further inquiry. Should the relationship approximate the dignity of a putative marriage, the woman is entitled to one-half of the joint accumulations, irrespective of the extent of her actual contribution.[1]

A clear distinction is made between the nature of property accumulated jointly under the circumstances mentioned and that accumulated by spouses during existence of lawful marriage. Goods jointly accumulated during the illicit or quasi-illicit relationship are **not** com-

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1. **Chapman v. Chapman,** (Civ. App.) 41 S. W. 533 (535) W. E. Refused.
Morgan v. Morgan, (Civ. App.) 21 S. W. 154 (155-156)
See **Harris v. Hobbs,** (Civ. App.) 54 S. W. 1085, wherein it is intimated the woman would be entitled to an agreed share.
Lee v. Lee, 112 Texas, 392, 247 S. W. 828.
Barkley v. Dumke, 99 Texas 150, 87 S. W. 1147.
Lawson v. Lawson, (Civ. App.) 69 S. W. 246, W. E. Refused.
Hammond v. Hammond, (CCA) 108 S. W. 1024, W. E. Refused.

munity property, technically speaking, but are **partnership** property; the respective undivided interests being separate estates. It is held that the woman's share is not subject to execution for individual debts contracted by the man.[2]

Hence, if either of a couple living in such illicit or questionable relationship should die, it is inconceivable that the Federal Estate Tax could be extended to include the share of the surviving partner; irrespective of which (if either) had been the active manager.

Such being the case, the practical effect of the provision of the Act under scrutiny, as construed by this Court, is to extend the Estate Tax in cases where an honorable and legal marital relationship exists, although it could not be extended in cases where a legal marriage did not exist. Can it be gainsaid that, under the Court's construction, the tax liability attaches to the entire estate solely because a lawful marriage exists? It is indeed difficult to escape the conclusion that a harsh penalty has been imposed on lawful marriage.

In an ordinary commercial partnership, it is not unusual for the managing partner to be

2. **Little v. Nicholson**, (Civ. App.) 187 S. W. 506 (508).

vested with a control over the firm's business and assets sometimes as broad as that of the husband in a ganacial partnership. Certainly it cannot be the law that if such a managing partner dies, the interests of his partners must be included in the decedent's estate, on the theory that the surviving partners receive a benefit from the managing partner's death by reason of termination of his management and control. The only distinction between such a commercial partnership and a ganacial partnership is the element of marriage. Hence the liabilities of the Act under consideration actually attach because of the marital relationship, and not because of the control.

It is submitted that any law striking at the institution of marriage is contrary to a sound Public Policy, in this country. It is, of course, realized that this Court cannot inquire into the policy of Congress in enacting the legislation in question, but it has been held by this Court that it **may** inquire whether the action of Congress is arbitrary or capricious. **Norman v. Baltimore & Ohio Railroad Co.,** 294 U. S. 240, 79 L. Ed. 885. The Act in question is monstrously arbitrary. In any event this Court does have power to construe the phrase **"such part there-**

of as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse" so as to give it an interpretation consonant with right and justice and place it beyond cavil.

It is true that throughout the ages there have been expounded the ideas of abolition of marriage, communization of women, and State nurture of children. We find such views in Plato's **Republic,** and know such to have been experimented upon by the Third Reich. It is realized that there is an active element in our own country which denounces marriage and family as **bourgeois.** Nevertheless, destruction of marriage and families is not the Public Policy of this country; at least at this time. The sentiment has been and still is Pythagorean rather than Platonic, and in Texas, Pythagorean rather than Pauline.

When it is remembered that the enlightened community property system, and the conception of man and wife as equal ganacial partners, were initiated in the western world by an absolute monarchy, in an age of despotism; it is indeed a strange commentary that they should be overthrown, or undermined, by the most august deliberative body of the great-

est democracy on earth, in the enlightened Twentieth Century.

The Spanish conception of marital partnership is based upon the consideration that a wife is not a bonded servant, or a chattel, but is a worthy, honorable, and dignified companion of man; and upon the theory that every wife who performs her marital duties has thereby contributed equally with the husband in earning the daily bread and in accumulating the family competence.

In England, the cradle of Liberty and Democracy, marriage was viewed otherwise than in tyrannically governed Hapsburg lands. Under the Common Law man and wife are **one,** and the husband is that one. What the husband has or earns is his, and much of what his wife has is **his** also. Her earnings belong to **him.** The earnings of the children belong to **him.** He has the right to sell or give away her very bed. As a matter of charity, perhaps, he cannot sell the clothes off her back. The Common Law conception of marriage necessarily regards a wife as an exalted **bonded** servant. The old phrase **baron et femme,** perhaps correctly expresses the idea. The husband is her lord and master. She is a suppliant, who is taken and supported

for whatever of pleasure or use may be exacted from her. She is a parasite, who, perhaps, earns her keep, but not a share of the profits. She is a person **non sui juris,** and prior to the Nineteenth Amendment was included in the category of "women, minors, idiots, lunatics, paupers, convicts, and regular soldiers."

Both the Spanish and English marital systems found root in the western world. The Texian colonists, who for the most part came from Common Law Lands, found the Spanish system in vogue in Texas. When these colonists obtained independence for Texas they rejected the Common Law system, and retained the Spanish. The community property system has been law of Texas for over three centuries, and the Anglo-Americans have consistently adhered to it, and nourished it, for one hundred ten years.

The Constitution of the United States guarantees that no citizen shall be deprived of property, without due process of law, yet the effect of the Act of Congress in question (as construed by this Court) is to evade the force of such guaranty by limiting the wife's share of the community to what she receives as compensation from her own hire to **third persons,** and to

the part of the community derived from her separate property. The Act itself does not expressly limit the compensation to that received from third persons, and is susceptible to the construction contended for in this argument.

It is the manner of men's thinking, and, perhaps, the Congress and this Court have unconsciously followed it, that whatever is earned is earned by the husband alone; that the wife earns nothing, and contributes nothing towards the family earnings, unless she hires out for wages herself. She is regarded as "living off" of her husband. In other words, she is a parasite, living off her **husband's** earnings; a "kept-woman".

The fact appears to have been overlooked that in an ordinary partnership among men, or among **femes sole,** the fact that one partner transacts the actual business whereby money is brought into the partnership till is not the criterion by which the right to distribution of profits is governed. One partner may be running the office, or keeping the books, or attending to routine matters, while the other is engaged in fabricating or selling the materials, or rendering the services, which actually produces the income. Yet no one would deny the

right of the more secluded partner to his agreed share of the profits, nor deny his real contribution to the earning power of the firm. Several mining prospectors apportion the work incident to the enterprise among them. One of them, who is best qualified, is designated to do the purchasing, cooking, washing, and housekeeping and routine duties, while the others are in the field. Where this secluded member has faithfully lived up to his compact, and relieved his associates of these many and menial duties, no one could question his right to his partnership share; although the finding of the ore is what brings the income and profits. Or if that housekeeping partner be a woman, a **feme sole,** would any deny that because she was a woman she should not have her share of the agreed profits? In the armed services, it is said that eight men in the rear echelon are required to keep a fighting man on the front line. Yet the contribution of the rear echelon is conceded.

In the matrimonial partnership each partner is a **specialist.** The average husband is usually trained in some particular wage earning vocation. The average wife is trained in domestic science and economy, a highly specialized field

To demonstrate the equality of the contributions to the partnership, at least so far as the wife is concerned, answers to the following questions will suffice. What husband, for the same, or even greater wages he is receiving, would be willing to bear children, if nature permitted him? What husband, for the same, or an even greater wage, would be willing to remain at home each day and night of the year and discharge as faithfully and as efficiently the same work his wife is engaged in? What husband for the same, or an even greater wage, would, or could, if he would, devote his entire time to the care and uprearing of children? Or, for instance would do a daily turn at a tub of child's clothing.

Perhaps no husband ever appreciates the contribution made by the wife, or his own utter helplessness, unless his wife becomes invalided, dies, or otherwise leaves him, with a child or children to personally care for. It is seldom that we hear of a husband left in any such plight who is able to both earn the living and personally take care of the children and the household. Yet, many wives who find themselves in similar circumstances have done so. When a husband is so left, he is usually compelled to hire and pay for the labor and services

which his wife performed, and what he receives for the expenditure is not of the same standard. In such circumstances it will become speedily apparent what the real earning power of that husband alone is.

It is submitted that the average wife actually earns of the income received by her husband at least her equal share. There are, of course, wives who contribute little or nothing to the family economy. It might be salutary if such were penalized. But the good wife, by virtue of performance of her marital duties alone, should be held to be entitled to her just half.

The Act of Congress under scrutiny is not consistent with its own theory, or with the standards of plain, common honesty, hence is unquestionably arbitrary. It provides that **whichever** of the spouses dies first the whole of the estate shall be included for taxation in the estate of the decedent. Now, if the wife is to be regarded prima facie, or conclusively, as not being entitled to one-half of the estate because she did not actually perform the identical services for which the salary or wages was paid, or it is held that the character of contribution made by the wife to the marital accretions does

not entitle her in her own right to any share, then if the wife die first, why should **any** part of the community estate, much less the whole, be taxed against the husband who is solely responsible for its accumulations? If the wife has earned her right to one-half of the community estate as provided by the Texas Constitution by simply performing her marital duties, then how can her half be honestly taxed?

The case in the main simmers down to the **quaere** whether or not a wife by performance of her marital duties alone actually earns or contributes in equal proportion to the earning of half (or any part) of the income paid to the husband as the result of their combined efforts in their respective fields. If she has earned or contributed to the earning of the family income, whether or not she rendered the actual service for which the income was paid by third parties, she has a vested right which must be protected by the Constitution of the United States. If the Constitution has lost its potency, the end of democratic institutions in this country is not far off.

The Brief for Appellees in this case presents sound law and supporting authorities. The

writer, however, believes that the aspects of the case set forth in this argument should be brought to the attention of the Court.

The Court is requested to reconsider its decision and to affirm the judgment below.

Respectfully submitted,

HOBART HUSON,
as Amicus Curiae,
(Refugio, Texas).